LEE LEE CHONG

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
AHMAD FAIRUZ JCA
HAIDAR MOHD NOOR JCA
[CRIMINAL APPEALS NO: A-05-37-95 & A-05-38-95]
17 OCTOBER 1998

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B - Trafficking in heroin - Maximum evaluation of evidence - Whether prosecution had made out a case of trafficking - Whether only proved a case of possession - Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 39B*

CRIMINAL PROCEDURE: *Police informer - Protection of - Section 40 Dangerous Drugs Act 1952 - Informer taking active part in negotiations but not involved in other transactions leading to accused's arrest - Whether exceeding his role as informer - Whether an agent provocateur - Whether prosecution obliged to produce informer as witness - Failure to produce - Whether fatal - Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 39B, 40 - Evidence Act 1950, s. 114(g)*

The appellant was charged in the High Court for an offence under s. 39B of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 155 grams of heroin. Before the learned judge, evidence was led which showed that the accused was enticed into a trap which the police had organised with the help of an informer, and that it was as a result of that trap that the accused had delivered the offensive drug to PW8, the agent provocateur. However, notwithstanding that he took an active part in the negotiations between PW8 and the accused, the informer did not participate in subsequent transactions that led to the accused's arrest. The prosecution maintained that the informer was protected by s. 40 of the Act, and in the circumstances did not produce or offer him as a witness. The learned judge ruled that the prosecution's failure to call or offer the informer as a witness had attracted an adverse inference under s. 114(g) of the Evidence Act 1950, and so made a finding at the close of the prosecution case that only a case of possession under s. 12(2) read with s. 39A of the Act had been proved. The accused, however, elected to remain silent upon his defence being called on the amended charge, and was convicted and sentenced to 15 years imprisonment and 12 strokes of the rotan.

The accused appealed against his conviction, whilst the Public Prosecutor, being dissatisfied with the conviction upon the lesser offence, also appealed. Before the learned appellate judges, the primary issues that arose were (i) whether the informer herein was in law an agent provocateur and was therefore not protected by s. 40 of the Act (ii) whether the prosecution's failure to call the informer or make him available as a witness to the accused was in the circumstances fatal to the prosecution's case.

Held:
Per Gopal Sri Ram JCA:

[1] The question whether a person is an informer or an agent provocateur is one that depends upon the role played by that person in all the circumstances of the case. There is no substitute for a meticulous examination of the facts of each case when seeking a resolution of the question.

[2] The informer was not merely present at the first meeting between PW8 and the accused, but had taken a very active part in the negotiations thereat. The learned judge was therefore correct in holding that the informer was an agent provocateur and had lost the protection of s. 40 of the Act.

[2a] However, apart from playing an active role at the meeting the informer did not take any further part in the transaction that led to the accused being charged for trafficking, and had indeed dropped out of sight after that meeting. This being the case, notwithstanding that he was an agent provocateur, the court is equally satisfied that the event that led to the arrest of the accused, namely, the delivery of the promised five pounds of heroin, and upon which the charge against him was based, is entirely free of any participation by the informer.

[2b] Bearing in mind the aforesaid, the failure to call the informer or to make him available as a witness to the defence was not fatal to the prosecution's case. The reason being that the evidence of the informer, who had by his conduct become an agent provocateur, was neither relevant nor material to the allegation that the accused had, at the request of PW8, delivered the drug which formed the subject matter of the charge. Accordingly, the prosecution's failure to call or make him available to the defence is of no consequence at this stage of the case. Whether it may be of consequence after the accused has given his evidence is a question that requires a different consideration altogether.

[3] A maximum evaluation of the evidence shows that, on the date and at the time specified in the original charge, the accused made delivery of the 155 grams of heroin in the manner described by PW8. It follows that the prosecution had made out a case of trafficking under s. 39B of the Act. The learned judge, in the circumstances, ought not to have amended the charge to one of possession.

[Prosecution's appeal allowed; accused ordered to enter defence on original charge.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah dituduh dalam Mahkamah Tinggi untuk satu kesalahan di bawah s. 39B Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar 155 gram dadah jenis heroin. Di hadapan hakim yang bijaksana, keterangan telah dikemukakan yang mana menunjukkan bahawa tertuduh telah dipujuk memasuki satu perangkap yang telah dibuat oleh polis dengan bantuan seorang informer, dan akibat perangkap itu perayu telah menghantar-serah dadah yang menyalahi itu kepada PW8, seorang ejen provocateur. Walaubagaimanapun, walaupun beliau telah memainkan peranan yang aktif dalam perundingan antara PW8 dan tertuduh, informer tersebut telah tidak mengambil bahagian dalam transaksi-transaksi yang berikutnya yang membawa kepada penangkapan tertuduh. Pihak pendakwaan berpendapat bahawa informer di sini telah dilindungi oleh s. 40 Akta, dan sehubungan dengan itu tidak memanggil atau menawarkan informer sebagai seorang saksi. Hakim yang bijaksana telah memutuskan bahawa kegagalan pihak pendakwaan untuk memanggil atau menawarkan informer sebagai seorang saksi telah menarik satu inferens yang memudaratkan di bawah s. 114(g) Akta Keterangan 1950, dan oleh yang demikian telah membuat satu keputusan bahawa pada penutupan kes pendakwaan hanya satu kes pemilikan di bawah s. 12(2) yang dibaca bersama dengan s. 39A Akta telah terbukti. Tertuduh walaubagaimanapun, memilih untuk berdiam diri apabila pembelaannya dipanggil atas tuduhan terpinda, dan telah disabitkan dan dijatuhkan hukuman pemenjaraan selama 15 tahun dan disebat dengan 12 sebatan rotan.

Tertuduh telah merayu terhadap sabitan, sedangkan pihak Pendakwa Raya, yang tidak berpuashati dengan sabitan ke atas kesalahan yang lebih ringan, telah juga membuat rayuan. Di hadapan hakim-hakim rayuan yang bijaksana, isu-isu utama yang berbangkit adalah (i) samada informer dalam kes ini adalah di sisi undang-undang merupakan seorang ejen provocateur dan oleh yang demikian tidak terlindung oleh s. 40 Akta (ii) samada kegagalan pihak pendakwaan untuk memanggil informer tersebut atau mengadakan dirinya sebagai saksi kepada tertuduh adalah dalam keadaan yang wujud memudaratkan kes pihak pendakwaan.

Diputuskan:
Oleh Gopal Sri Ram HMR:

[1] Persoalan samada seseorang merupakan informer atau ejen provocateur adalah bergantung pada peranan yang dimainkan oleh orang itu dalam kesemua keadaan kes. Tidak ada gantinya bagi pemeriksaan yang teliti akan fakta-fakta setiap satu kes ketika cuba untuk mendapatkan penetapan persoalan ini.

[2] Informer tersebut bukan hanya hadir di perjumpaan yang pertama antara PW8 dan tertuduh, tetapi telah memainkan peranan yang aktif dalam perundingan-perundingan disitu. Hakim yang bijaksana adalah dengan itu betul ketika memutuskan bahawa informer tersebut adalah seorang ejen provocateur dan tidak lagi menerima perlindungan s. 40 Akta.

[2a] Walaubagaimanapun, selain daripada memainkan peranan yang aktif di perjumpaan tersebut, informer tersebut tidak memainkan sebarang bahagian yang seterusnya dalam transaksi yang membawa kepada tertuduh dituduh atas tuduhan mengedar, dan telah sesungguhnya menghilangkan diri selepas perjumpaan itu. Oleh kerana keadaannya sedemikian, meskipun beliau merupakan ejen provocateur, mahkamah berpuashati bahawa peristiwa yang membawa kepada penahanan tertuduh, iaitu, penghantar-serahan lima paun dadah heroin yang dijanjikan itu, dan di atas yang mana tuduhan terhadapnya telah diasaskan, adalah sesungguhnya bebas daripada sebarang penyertaan oleh informer tersebut.

[2b] Mengambilkira persoalan-persoalan di atas, kegagalan untuk memanggil informer atau untuk mengemukakannya sebagai seorang saksi kepada pembelaan tersebut tidak memudaratkan kes pihak pendakwaan. Alasannya adalah bahawa keterangan informer, yang dengan perlakuannya menjadi seorang ejen provocateur, adalah tidak relavan atau penting kepada dakwaan bahawa tertuduh telah, atas permintaan PW8, menghantar-serahkan dadah tersebut yang menjadi hal-perkara pertuduhan. Sehubungan itu, kegagalan pihak pendakwaan untuk memanggil atau mengemukakan beliau untuk pihak pembelaan tidak mempunyai sebarang akibat kepada kes tersebut di peringkat ini. Samada ianya mungkin menjadi penting selepas tertuduh memberikan keterangannya adalah merupakan persoalan yang memerlukan pertimbangan yang berlainan sama sekali.

[3] Penilaian maksima akan keterangan yang ada menunjukkan bahawa, pada tarikh dan masa yang ditentukan dalam pertuduhan asal, tertuduh telah menghantar-serah 155 gram dadah jenis heroin menurut cara yang diterangkan oleh PW8. Ianya mengikut bahawa pihak pendakwaan telah membentuk satu kes pengedaran dadah di bawah s. 39B Akta. Hakim yang bijaksana, dalam keadaan tersebut, tidak seharusnya meminda tuduhan tersebut kepada tuduhan pemilikan.

[Rayuan pihak pendakwaan dibenarkan; tertuduh diperintah supaya memasukkan pembelaan ke atas tuduhan asal.]

Cases referred to:
Abdullah Zawawi v. PP [1993] 4 CLJ 1 ***(foll)***
Arulpragasan v. PP [1996] 4 CLJ 597 ***(foll)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 ***(dist)***
PP v. Mansor Mohd Rashid & Anor [1997] 1 CLJ 233 ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 39A(2)(a), 39B, 40

For the appellant - K Kumarendran; M/s Kumar & Sitham
For the respondent - K Muniandy, DPP

[Appeal from High Court, Ipoh; Criminal Case No: PCT-58-3-92]

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

Introduction

The appellant Lee Lee Chong ("the accused") was charged with an offence of trafficking 155 grams of heroin on 30 March 1991 under s. 39B of the Dangerous Drugs Act 1952 ("the Act"). At the close of the prosecution's case, the learned judge came to the conclusion that the charge had not been proved. He however found that the lesser charge of possession had been made out and therefore amended the charge to one under s. 12(2) read with s. 39A(2)(a) of the Act. Upon his defence being called on the amended charge, the accused elected to remain silent. The judge then convicted the accused on the amended charge and sentenced him to a term of fifteen years imprisonment and twelve strokes of the rotan. The accused appealed against his conviction ("the appeal"). The Public Prosecutor, being dissatisfied with the conviction upon the lesser offence, also appealed ("the cross appeal"). The appeal and cross appeal came before us on 15 June 1998. At the close of arguments, we found ourselves in agreement with the arguments advanced on behalf of the Public

Prosecutor. We therefore dismissed the appeal, allowed the cross appeal and ordered the accused to make his defence upon the original charge of trafficking. The reasons for our decision now follow.

The Facts

On 22 March 1991, ASP Badaruddin (PW6) having received information from a source regaling in the name "Tiger Lim" ("the informer") that a Chinese male was trafficking dangerous drugs from Ipoh to Kuala Lumpur mounted an operation to capture the offender. PW6 then introduced Constable Lim Thian Siong (PW8) to the informer. PW8 was to act as a buyer of drugs, an agent provocateur, in order to flush out the suspected trafficker. The informer was to introduce PW8 to the suspected trafficker. At about 9.45pm on the same day, PW8 met the informer and the accused. Negotiations for the sale of heroin were conducted. The evidence reveals that both the accused as well as the informer took an active part in these negotiations. On the following day (23 March), PW8 communicated with the accused through the latter's pager and requested for the delivery of one pound weight of heroin. Later, that day, the accused informed PW8 that the drug in question was not available. On 24 March the accused by prior arrangement delivered a pound of heroin to PW8 at the hotel into which PW8 had earlier checked in and received payment RM4,000. The police had already decided not to arrest the accused on this occasion as they wanted to discover the person behind the trafficking. Five days later, on 29 March PW8 contacted the accused and asked for five pounds weight of heroin. The accused agreed to deliver it on the evening of the following day and indicated that the price would be RM4,000 per pound. A trap was set. In accordance with the accused's suggestion, PW8 met him at a bus stop near the hotel earlier mentioned. The accused was in car No. ABK 7728. PW8 joined him in the car. The accused then produced from under the front passenger seat occupied by PW8, a yellow plastic bag (exh. P6). Inside P6 was another white plastic bag (exh. P7). Within P6 were five plastic packets (exh. P3 (A1) to (E1)), each of which was wrapped in a newspaper (exh. P8(a) to (e)). PW8 then asked the accused to drive to the hotel so that payment for the drugs could be made. On arrival at the hotel, PW8 alighted from the car and gave a pre-arranged signal to the police party lying in wait. Despite the accused's attempt to flee, he was arrested. Exhibit P3 (A1) to (E1) were seized and sent for chemical analysis. They were found to contain 155 grams of heroin.

In the appeal and cross appeal before us, both sides raised three main issues. We will now deal with each of these.

Informer Or Agent Provocateur?

At the trial of the accused, the facts thus far summarised were adduced in evidence. However, the prosecution neither called nor made available the informer as a witness. They relied on s. 40 of the Act which protects informers. But it must be mentioned that similar protection is not afforded to agent provocateurs who are usually important witnesses to the unfolding of the prosecution's case.

At the close of its case, the prosecution argued that the informer had not played such a role in the transaction as to deprive him of the protection afforded by s. 40. It was submitted that a case of trafficking had been made out which if unrebutted would warrant the conviction of the accused. Counsel for the accused, however, argued that the informer had, in the circumstances adduced in evidence, ceased to be a mere informer. He had played part of an agent provocateur and not a mere informer. The prosecution was therefore obliged to produce him as a witness of the narrative or at the very least offer him to the defence. Since neither course was adopted, an adverse inference must be drawn. It must be inferred that the evidence of the so-called informer, if adduced, would have been unfavourable to the prosecution. It followed that no case whatsoever had been made out against the accused.

The learned judge did not accede to either of the extreme courses suggested in the foregoing submissions of the prosecution and the defence. Instead, he took a middle course. He found that the informer had indeed exceeded the narrow role assigned to him by law and had played the part of an agent provocateur. He held the prosecution's failure to call the alleged informer as a witness resulted in an adverse inference being drawn against the prosecution, though not to the extent suggested by the accused. He found that on the evidence before him only a case of possession had been proved.

Before us the finding of the learned judge was attacked both in the appeal and the cross appeal. For the Public Prosecutor it was submitted that the learned judge had gone too far in holding that the informer was in truth an agent provocateur. According to the learned deputy who argued the cross appeal, no adverse inference could be drawn against the prosecution for its failure to either call the informer or make him available to the accused.

Before we express our views on this branch of the case, we find it necessary to advert to two cases that deal with the point under discussion. Both are decisions of the apex court. The first is *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1; [1995] 2 MLJ 433. In that case the appellant alleged that he had been enticed into a deliberate trap planned and organised by certain police officers and an alleged informer called Koh Loh and his friend. The trap was

then sprung and the appellant apprehended after he had handed a bag containing a quantity of a dangerous drug to one Lian who acted as an agent provocateur. On his defence being called at the end of the prosecution's case, the appellant testified that he was an innocent carrier of the drug in question and that he had been asked by Koh Loh to hand the bag to Lian. The trial judge rejected the defence and convicted the appellant. On appeal, the Federal Court set aside the conviction and acquitted the appellant. After considering the salient aspects of the evidence, Edgar Joseph Jr. FCJ, said of the third person that:

> ... having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur for it was he who had put the appellant in touch with the undercover agent, Lian. Indeed, he was the active instrument without whose intervention, the appellant might never have been even arrested. His identity was no longer a secret and thus, he had lost the protection from disclosure of identity normally accorded to informers under s. 40 of the Act.

After examining several leading authorities on the duty of the prosecution to call material witnesses, his Lordship accepted as:

> clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see, eg, *Adel Muhammed el Dabbah v. A-G of Palestine* [1944] AC 156 at pp. 167–169; [1944] 2 All ER 139 at pp. 143–144), the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation – which is nothing less than a statutory duty – the accused must be acquitted.

He further held that in the circumstances of that case, the informer Koh Loh:

> came within the category of witnesses described by Lord Roche in *Seneviratne,* as 'witnesses essential to the unfolding of the narratives on which the prosecution case is based'. The same might be said of the informer's friend.
>
> Yet, neither the so-called informer nor his friend, whose testimony would have been essential to the unfolding of the narrative on which the prosecution case was based, was called by the prosecution or even made available to the defence to be called as defence witnesses nor any explanation vouchsafed to the trial judge for these glaring omissions.

The second decision that calls for consideration is *Public Prosecutor v. Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 the headnote to which sets out the facts of that case as follows:

> Following a tip from an informer, the police from the drug prevention unit started

investigation on the operation of a drug syndicate in Perak. The informer introduced a police agent provocateur, who posed as a trafficker who wanted to buy cannabis, to the second respondent. The second respondent later took them to a house to see his 'partner', the first respondent. On 31 July 1991, the informer and the police agent provocateur returned to the house to carry out negotiations for the sale and purchase of cannabis with the respondents. When the police agent provocateur expressed his intention to inspect the merchandise, the second respondent took a slab of plant material which was wrapped with a transparent plastic from a room in the house. As planned, the informer was then asked to get the money from a car parked outside the house, and the police agent provocateur then excused himself to go to the washroom. At this time, the team of police which were stationed outside the house moved in to arrest the respondents. The plant material were confirmed to be cannabis by the government chemist. The two respondents were charged with trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952. At trial, the judge held that no *prima facie* case had been made out against the respondents, on the following grounds: (i) it was doubtful whether the cannabis produced in this case was the very cannabis seized by the police – there was a patent break in the chain of evidence as the chemist failed to give evidence as to how she handled the cannabis from the time she received it from the investigating officer until the time she handed them back to him; (ii) a person called Amran was also the occupier of the room from which the cannabis was taken, and hence the respondents could not be said to have exclusive custody and control of the drugs; (iii) the prosecution had failed to call Amran as well as the informer, who had actually played the role of an agent provocateur, as witnesses, and thus the court was entitled to draw adverse presumptions under s. 114(g) of the Evidence Act 1950 ('the Act'); and (iv) the failure of police to, *inter alia*, lift fingerprints from the cannabis' wrapper and to take photographs of the street-lights in relation to the house, had grave adverse effect on the prosecution's case. The trial judge accordingly acquitted and discharged the respondents without their defence being called. The public prosecutor appealed.

The Federal Court allowed the appeal. Chong Siew Fai CJ (Sabah & Sarawak) when delivering the judgment of the court said (at p. 578):

In *Munusamy v. PP* [1987] 1 MLJ 492 (SC), Mohd Azmi SCJ (now FCJ) in delivering the judgment of the court, opined (at p. 494) that 'whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case'. In our instant case under appeal though Cholar introduced PW9 to the second respondent and was present when both transactions involving cannabis were struck, **there was no evidence that he had done anything apart from being present.** It appears obvious that his presence during the negotiation process and the transactions was merely to lend credence to PW9's intention to purchase the cannabis in the minds of the respondents. In *Namasiyiam & Ors v. PP* [1987] 2 MLJ 336, the judgment shows that Francis, the 'informer' (as the police called him throughout the trial)

a took an active part not only by introducing the agent provocateur to the offenders but also acted as the latter's spokesman and participated in the trap leading to the arrests of the offenders and the seizure of the drugs.

On the particular facts and circumstances of the instant case under appeal, we are of the view that Cholar was not an agent provocateur. But even if he was, b there is more than sufficient credible evidence of the respondents' involvement in the negotiation and agreement to sell to PW9 the 902g of cannabis subsequently brought out by the second respondent from room 'K' in the said house. (Emphasis added.)

The effect of these two decisions and the authorities referred to by the learned c Chief Judge of Sabah and Sarawak in the latter case is that the question whether a person is an informer or an agent provocateur is one that depends upon the role played by that person in all the circumstances of the particular case. There is in our view no substitute for a meticulous examination of the facts of each case when seeking a resolution of the question.

d In the present appeal, a review of the evidence shows that the informer was not merely present at the first meeting between PW8 and the accused. From all accounts, he took a very active part in the negotiations at that meeting. We are therefore satisfied that the learned judge was entirely correct in holding that the informer was an agent provocateur and had lost the protection afforded e by s. 40 of the Act. Nevertheless, we are, in the circumstances of the case, equally satisfied that the failure to call the informer or to make him available as a witness to the defence was not fatal to the prosecution's case. Our reasons for arriving at this conclusion are as follows.

f Apart from playing a very active role at the meeting to which we referred a moment ago there is no evidence within the prosecution's case suggesting that the informer took any further part in the transaction that led to the accused being charged for trafficking. Indeed, he appears to have dropped out of sight after that meeting. All further contact between PW8 and the accused were direct with no intervention of any intermediary. And the event that led to the g arrest of the accused, namely, the delivery of the promised five pounds of heroin, and upon which the charge against him is based, is entirely free of any participation by the informer.

We emphasise that this is not a case (such as *Ti Chuee Hiang (supra)*) where h there was evidence from the appellant showing the participation of the informer in the actual delivery of the dangerous drug. Here, the accused was solely relying upon the prosecution's evidence to suggest that the informer had played a part in the incident forming the substratum of the charge. But it is clear that the evidence in its present state does not go that far.

i We are also entirely conscious that this is not a case (such as *Mansor bin*

Mohd Rashid (supra)) where the informer was merely present. We accept the learned judge's finding of active participation. Where we are unable to agree with him is that such active participation extended to the transaction at the heart of the charge.

To put it in another way, the evidence of the informer (who had by his conduct become an agent provocateur) was neither relevant nor material to the allegation that the accused had, at the request of PW8, delivered the drug which forms the subject matter of the charge. Accordingly, the prosecution's failure to call or make him available to the defence is of no consequence **at this stage of the case**. Whether it may be of consequence after the accused has given his evidence is a matter of pure speculation into which we do not propose to indulge.

A maximum evaluation of the evidence shows that, on the date and at the time specified in the original charge, the accused made delivery of the 155 grams of heroin in the manner described by PW8. It follows that the prosecution had made out a case of trafficking under s. 39B of the Act in accordance with the test laid down by the majority in *Arulpragasan v. Public Prosecutor* [1996] 4 CLJ 597; [1997] 1 MLJ 1.

Identity Of Exhibit

The other point advanced by the accused in support of his appeal is that there had been a break in the chain of evidence. According to his counsel there is a discrepancy in the drug seized at the scene of the crime and that examined by the chemist. Having carefully scrutinised the evidence we are satisfied that the drug seized by the police at the scene was indeed the same drug that that was examined by the chemist and later produced in court. There was therefore no gap in the proof of the identity of the drug. Consequently, we find ourselves in agreement with the submission of the learned deputy that there was no break in the chain of evidence.

Attempt To Flee

The last point we would like to deal with is the learned deputy's submission in support of the cross appeal that the learned judge failed to take into account the accused's attempt to flee the scene. By reason of the conclusion we have arrived at in this matter, we consider it unwise to make much comment on the argument advanced. Suffice to say that flight, or attempted flight, from the scene of a crime is recognised by high authority as not in itself signifying guilt for, "an innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way". (See *Abdullah Zawawi v. Public Prosecutor* [1993] 3 MLJ 1, at p. 9, per Edgar Joseph Jr., SCJ)

Conclusion

For the reasons already given, we came to the conclusion at the close of argument that this was a case in which the learned judge had seriously misdirected himself on the evidence led before him in support of the charge against the accused. The learned judge ought not to have amended the charge to one of possession. We therefore allowed the appeal and set aside the order of the learned judge. We also remitted the case to the learned judge with a direction to call the defence of the accused on the original charge.